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No. 95-1007

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

WASHINGTON SUBURBAN SANITARY COMMISSION,

Petitioner,

V.

WESTFARM ASSOCIATES LIMITED PARTNERSHIP, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether migration of a hazardous substance from its original source of discharge through adjoining properties constitutes a "release" for which liability triggers under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

2. Whether the leaking of a hazardous substance by passive migration through the cracks and joints in a publicly-owned sewer system constitutes a "release" from a "facility" rendering the sewer system liable under CERCLA, 42 U.S.C. § 9607(a) when the hazardous substance was originally released into the sewer system by an industrial user of the system.

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BRIEF IN OPPOSITION

Respondent, International Fabricare Institute ("IFI"), respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Fourth Circuit's opinion below. That opinion is reported at 66 F.3d 669 (4th Cir. 1995) and is reprinted in the petition for certiorari at Appendix A.

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of "release," "environment," and "facility" as those terms are used in CERCLA.

Section 9607(a) of CERCLA states:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned and operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessel or sites selected by such person, from which there is a

> release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Section 9601(22) states:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer or such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or

> special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory commission under section 170 of such Act [42 U.S.C.A. § 2010], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

"Environment," as used in § 9601(22), is defined by 42 U.S.C. § 9601(8) as:

> (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

A "facility" is defined as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment,

> ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

STATEMENT OF THE CASE

Respondent International Fabricare Institute ("IFI"), a trade association of dry cleaners, has its international headquarters in Silver Spring, Maryland. IFI's facility includes, among other things, a laboratory and various types of dry cleaning equipment used in research activities. From the inception of IFI's operations at this location in 1974 until 1992, small amounts of tetrachloroethylene ("PCE"), an organic solvent widely using in the dry cleaning industry, were discharged from IFI's laboratory and certain dry cleaning machines into a sanitary sewer line, known as the Tech Road sewer, owned and operated by Petitioner Washington Suburban Sanitary Commission ("WSSC"). IFI received a permit in 1974 to connect its facility to the Tech Road sewer line, which WSSC had constructed several years earlier, in 1968. Prior to beginning operations at this location, IFI notified WSSC of the quantities and types of chemicals, including several hazardous substances, that would be discharged by the facility into the sewer system.

On January 2, 1992, Respondent Westfarm Associates Limited Partnership ("Westfarm"), a property developer in the Washington, D.C. metropolitan area, sued IFI for response costs under the Comprehensive Environmental Response, Compensation and Liability Act

("CERCLA"), 42 U.S.C. § 9607(a). Westfarm initiated its suit against IFI as a result of an environmental audit conducted in 1991 in connection with the proposed sale of a parcel of Westfarm's property. The environmental audit revealed the presence of PCE in the groundwater beneath the property. Westfarm was able to identify IFI's property as a potential source of the PCE contamination.

In January 1993, WSSC became a party to the suit when the court granted IFI's motion to file a complaint against WSSC as a third party. IFI's complaint against WSSC asserted claims under Maryland common law as well as under CERCLA. Westfarm subsequently amended its complaint to include WSSC as a defendant.

Westfarm and IFI asserted claims against WSSC due to leaking pipes in the Tech Road sewer which allowed PCE to escape into the environment. In 1977, WSSC conducted a survey of its sewer system and found that there had been excessive infiltration into the Tech Road sewer -- leakage of groundwater or surface waters into the sewer line when seasonal groundwater tables were high enough to reach the line -- as to which corrective action was not taken. Additionally, WSSC was aware, as early as 1974, that IFI disposed of chemicals and hazardous substances into the sewer system. WSSC failed to regulate the quantity of hazardous substances which could be introduced into the sewer system, although after 1983 it did regulate the concentration of these substances.

In July 1993, the District Court found IFI and WSSC jointly and severally liable, pursuant to CERCLA, for the remediation of the PCE contamination. Subsequently, a jury awarded damages to Westfarm against IFI and WSSC, jointly and severally. WSSC now seeks review of the District Court's holding pursuant to CERCLA, but not of the

jury's award of damages. WSSC alleges that it should not be liable under CERCLA because PCE "migrated" from IFI's property through IFI's sewer line and into the Tech Road sewer, whence it leaked into subsurface soils and groundwater and moved onto Westfarm's property. Because of what WSSC terms the "passive migration" of PCE through its sewer lines, WSSC claims that it should not be liable. WSSC further argues that CERCLA requires a "release" from a "facility," and that only one release is possible -- the initial release from IFI's laboratory. WSSC's arguments on these issues were rejected by both the District Court and the Court of Appeals.

REASONS TO DENY THE WRIT

I. The Petition Raises No Important or Novel Issues.

Review by this Court on writ of certiorari is a matter of judicial discretion which will be granted only when there are special and important reasons for review. S. Ct. R. 10.1. One of the factors considered by this Court is whether the issues presented are novel and important. *See, e.g., O'Brien v. Brown*, 409 U.S. 1, 92 S. Ct. 2718, 34 L.Ed.2d 1 (1972) ("The petition for certiorari presents novel questions of importance . . ."); *Times Film Corp. v. Chicago*, 365 U.S. 43 (1960).

In its effort to obtain review by this Court, WSSC has attempted to characterize the issue of whether municipalities and sewer authorities can be held liable under CERCLA as one of national importance. WSSC asserts that the Court of Appeals' decision "raises the *spectra [sic]* of immense CERCLA liability for municipalities and local governments." *See* Petition at 8-9. The issues raised by WSSC in the instant case are not novel. Municipal liability under CERCLA exists in other forms, has been recognized repeatedly by

federal courts, and the decision of the Court of Appeals is not in conflict with those decisions. Since WSSC fails to raise novel and important issues in its petition, its claims are not cognizable, and review should be denied.

A. The Decisions Below Do Not Conflict With *Lincoln Properties v. Higgins.*

WSSC argues that the District Court's and the Court of Appeals' decisions in this matter have "generated considerable discussion," in part because the rulings assertedly conflict with *Lincoln Properties, Ltd. v. Higgins,* 823 F. Supp. 1528 (E.D. Cal. 1992). *See* Petition at 9. WSSC's claim ignores the analysis by the district court in *Lincoln Properties*. In that case, the sewer authority, San Joaquin County, was not held liable under CERCLA for releases of hazardous substances from its sewer system. However, the court did not reach this result simply because the County was a municipality. Rather, the *Lincoln Properties* court found that, under the facts of that case, the County was entitled to the benefit of CERCLA's "innocent third party" defense. But for this defense, the County would have been liable as the owner/operator of the leaking sewer line. *Id.* at 1544.

In *Lincoln Properties,* the County proved the elements of this CERCLA affirmative defense. The county successfully demonstrated that it exercised due care with respect to the hazardous substances in question and that it took precautions against foreseeable acts or omissions of the third party who placed them in the sewer. *Id.* at 1539-40. The court found that the releases were not foreseeable, that San Joaquin County did not engage in any conduct which would contribute to the release, that there was a county ordinance which completely prohibited the discharge of cleaning solvents into the sewer system, that the County

exercised due care by repairing cracks in the sewer lines when leaks were discovered, and that the sewer lines were built and maintained in accordance with industry standards.

In the present case, the District Court and the Court of Appeals rejected WSSC's effort to establish the innocent third party defense. Based on the findings of fact below, this case is clearly distinguishable from *Lincoln Properties* with respect to the municipality's exercise of due care. WSSC, unlike San Joaquin County, did not exercise due care with respect to the PCE introduced into the sewer system and did not take precautions against foreseeable acts or omissions of a third party. In 1979 WSSC was given notice of the danger to groundwater from leaky sewers. Furthermore, as far back as 1974, WSSC was aware that IFI disposed small amounts of chemicals into the sewer; WSSC's regulations allowed discharge of toxic organics in limited concentrations; and WSSC had knowledge of IFI's use of PCE. *See Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995) *reprinted in* Petition at Appendix (App.) A at 32a. Although both the District Court and the Court of Appeals recognized that IFI did not report discharges of PCE, neither court found or suggested that IFI "lied" about its practice of disposing PCE down its laboratory sinks. *See* Petition at 7. On the contrary, the Court of Appeals concurred with the District Court that WSSC should have reasonably perceived some risk that potential groundwater contaminants such as PCE were being released into the sewer. *See Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995) *reprinted in* Petition App. A at 32a[1].

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[1] As framed by WSSC, this case supposedly presents the issue of whether a "victimized" property owner -- in this case WSSC -- on whose property another person -- IFI -- released hazardous substances should properly be liable for

Thus, there is no conflict between this case and *Lincoln Properties*. There, as here, the court recognized that municipalities are not different from other persons for purposes of CERCLA liability. Under that precedent, as under this one, municipalities are strictly liable for releases of hazardous substances from their underground pipes, but may under appropriate facts invoke the statute's "innocent third party" defense. WSSC's real difficulty is that it simply did not, on the evidence, qualify for this defense, and it now asks this Court to review the question of municipal liability as if this defense does not exist. This is not the sort of "novel question of importance" that warrants this Court's review.

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subsequent migration of the hazardous substances onto the property of a third party -- Westfarm. *See* Petition at i. The District Court and the Court of Appeals did not find WSSC to be an unknowing victim. (Indeed, the jury found WSSC negligent in its construction and maintenance of the Tech Road sewer.) WSSC constructed the Tech Road sewer as a conveyance for wastewater, and wastewater moved through that conveyance with WSSC's full knowledge. WSSC knew that IFI was discharging hazardous substances into the sewer system. Prior to 1983, WSSC did not limit discharges of toxic organic chemicals into its sewer system, and after that date, WSSC merely limited the concentration -- not the total quantity -- of toxic organic chemicals which could be placed into the system. *Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 *reprinted in* Petition App. A at 7a. In light of these facts, the movement of wastewater containing hazardous substances through the Tech Road sewer line was intended and foreseeable. Even if this Court wished to review the question of whether the unknown migration of contaminants across a landowner's property is a proper basis for imposing CERCLA liability on a "victimized" party, this case does not present such facts.

B. Municipal Liability Under CERCLA Has Been Repeatedly Recognized.

This Court has previously decided that States are explicitly included within CERCLA's definition of "person." In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989), in which it was decided that a State could be sued in federal court for monetary damages associated with cleanup costs for coal tar deposits in a creek, this Court stated,

> [t]he express inclusion of States within the statute's definition of 'persons,' and the plain statement that States are to be considered 'owners or operators' in all but very narrow circumstances, together convey a message of unmistakable clarity: Congress intended that States be liable along with everyone else for cleanup costs recoverable under CERCLA.

Id. at 8.

The definition of "person" in the statute, 42 U.S.C. § 9601(22), explicitly includes municipalities, states, and other political subdivisions. It is therefore clear that municipalities and other political subdivisions can also be held liable for CERCLA cleanup costs, whether as owners or operators of a facility from which hazardous substances are released to the environment or as persons who "arranged for disposal" of hazardous substances at that facility. *See* 42 U.S.C § 9607(a)(1-3).

In particular, several district courts and at least one court of appeals have imposed CERCLA liability on municipalities for releases of hazardous substances from municipal solid waste landfills. Noting that the definition of

"person" includes such entities, these courts have discerned no indication that such persons were not intended to be covered by CERCLA's liability provisions. These courts viewed the fact that CERCLA includes limited exceptions to potential municipal liability as evidence of Congress' intent to otherwise subject municipalities to CERCLA liability. *See, e.g., B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1198-99 (2d Cir. 1992); *Transportation Leasing Co. v. The State of California*, 861 F. Supp 931 (C.D. Cal. 1993); *State of New Jersey v. Gloucester Env. Mgt. Serv.*, 821 F. Supp. 999, 1004-05 (D. N.J. 1993) ("If Congress had the ability to make explicit exemptions from liability in these sections, it had the ability to make exemptions in 42 U.S.C. § 9607(a)."); *Rhodes v. County of Darlington, S. Carolina*, 833 F. Supp. 1163, 1176 (D. S.C. 1992) (holding that the county as the owner-operator of a landfill was a "covered person" within the meaning of CERCLA).

The liability which WSSC now seeks to avoid is neither different from nor more significant than the liability imposed on municipalities under CERCLA as owners and operators of solid waste landfills from which hazardous substances sent by other persons have leaked into the environment. In both situations, the municipality accepts waste from the public, whether in the form of garbage or sewage. If the municipality has failed to contain the hazardous constituents which are present in such wastes, and hazardous substances escape from either type of facility, the municipality is strictly liable for resulting response costs.

There is simply no meaningful distinction between municipalities' liability under CERCLA for contamination emanating from publicly-owned landfills and that emanating from publicly-owned sewers. The present case presents no novel and important question of CERCLA jurisprudence; it

is simply a garden-variety case arising under well-settled principles of municipal liability.

C. Municipalities Have No Special Status Under CERCLA.

In support of its argument that the prior decisions in this case would unfairly "saddle" municipalities and sewer authorities with liability under CERCLA, WSSC asserts that such liability " . . . violates the fundamental principle underlying CERCLA by impermissibly shifting the burden of remediating releases of hazardous substance directly to the taxpayer." *See* Petition at 10, quoting Robert M. Frye, Note, *Municipal Sewer Liability Under CERCLA: Should Taxpayers Be Liable For Superfund Cleanup Costs? Westfarm Associates Limited Partnership v. International Fabricare Institute,* 14 Stan. Envtl. L.J. 61, 95-96 (Jan. 1995).[2]

The federal courts have already addressed and rejected the theory that municipalities and their taxpayers should be accorded a special favored status in connection with liability for solid waste disposal. In *B.F. Goodrich v.*

[2] WSSC omits to note that a municipality may be able to shift part or all of its CERCLA liability to other responsible parties. Persons, who "arranged" for the placement of wastes containing hazardous substances in a municipal landfill or a municipal sewer, *e.g.*, industrial generators of solid waste, are jointly and severally liable with the facility owner or operator. *See* 42 U.S.C. § 107. These "arrangers" may be required to contribute all or part of the costs of remediation of leaks from the municipal facility in a contribution action under CERCLA. 42 U.S.C § 113(j). By way of illustration, in the instant case, IFI itself was held jointly and severally liable with WSSC for Westfarm's costs of environmental remediation.

Murtha, 958 F.2d 1192, several Connecticut towns and cities sought to escape liability for cleanup costs at a landfill to which they had shipped garbage, arguing that their taxpayers should be spared this financial burden. The Second Circuit affirmed the municipalities' liability, stating:

> [w]e agree that this [taxpayers in these jurisdictions shouldering the costs of cleanup] will inevitably be the result, but are unable to agree that it is adverse to Congress' aim. To the contrary, a narrow interpretation of CERCLA that exempts municipalities arranging for the disposal of municipal solid waste from liability increases the probability that cleanup costs will never be recovered, and will be paid instead from the Superfund funded in part by the taxpayers at large.

Id. at 1204.

The Court acknowledged that such a holding would have ". . . far reaching implications for municipalities and their taxpayers . . .," but noted that ". . . burdensome consequences are not sufficient grounds to judicially graft an exemption onto a statute, a graft that would thwart the language, purpose, and agency interpretation of the statute." *Id.* at 1206.

Furthermore, the liability about which WSSC complains is directly analogous to that faced by non-governmental persons under CERCLA. It may be true that, as WSSC notes, CERCLA's liability system may impose large cleanup costs on municipalities for releases both from landfills and from sewer systems. It may also be true that many public bodies may have historically found it impracticable to prevent the introduction of hazardous

substances into their landfills and sewer systems. These facts do not set municipalities apart from individuals and companies with respect to CERCLA's financial impacts. Both public and private sector entities have faced, and will continue to face, huge liabilities for cleanups under CERCLA, often for releases of hazardous substances that were unforeseen and uncontrollable under former waste management techniques. CERCLA's liability system is neither more unfair nor more burdensome to municipalities than it is to the thousands of businesses, large and small, that have routinely been held strictly liable for cleanup costs during the statute's fifteen year existence.

Again, then, WSSC's effort to have this Court consider carving out a taxpayer-protection exemption under CERCLA presents no novel and important question of law appropriate for review by this Court. Rather, it presents a fundamental question of public policy that Congress has long since decided.

II. There is No Disagreement Among Courts of Appeals Regarding WSSC's "Single" Release Theory.

Pursuant to Supreme Court Rule 10, this Court will generally grant review on writ of certiorari when a court of appeals has rendered a decision in conflict with the decision of another court of appeals. S. Ct. R. 10.1(a). As previously stated by this Court , "[a] principal purpose for which we use our certiorari jurisdiction, . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 348 , 111 S. Ct. 1854, 114 L.Ed.2d 385 (1991).

In an effort to obtain review by this Court, WSSC misstates the facts and obscures relevant precedents when it asserts that there is a split of authority concerning whether a "release" under CERCLA can occur only once and whether a person through whose property a hazardous substance subsequently migrates can be held liable as the owner of a facility from which there is a release.[3] WSSC cites three decisions as standing for the proposition that CERCLA's definition of "release" should be broadly interpreted to include "passive" migration of hazardous substances on or across a parcel of property. *See* Petition at 14-15 *(citing Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir. 1992), *cert. denied*, 121 L.Ed.2d 288; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988)). WSSC cites only district court decisions as holding that CERCLA owner/operator liability is only attributable to the person who owns the property where a hazardous substance is released, and not to a person who owns separate property onto which the substances passively migrate. *See* Petition at 12-14 *(citing Brookfield-North Riverside Water Comm'n v. Martin Oil Mktg. Ltd.*, No. 90 C 5884, 1992 WL 63274 (N.D. Ill. 1992); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988), *rescinded, vacated and dismissed, in part, on other grounds*, 1989 WL 225428 (D. Vt. 1989); *United States v. Petersen Sand and Gravel, Inc.*, 806 F. Supp. 1346, 1350-51 (N.D. Ill. 1992); *Snediker Developers Ltd. Partnership v. Evans*, 773 F. Supp. 984, 988-89 (E.D. Mich. 1991); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1456-58 (N.D. Cal. 1989); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 21 Env't. Rep.

[3] 42 U.S.C. §9601(22) defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying , discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ."

Cas. 1108, 1113 (BNA 1984), *rev'd in part on other grounds*, 840 F.2d 691 (9th Cir. 1988). Thus, at the outset, in the absence of any court of appeals decision contrary to *Nurad*, *Dedham Water*, or *Tanglewood East Homeowners*, *supra*, WSSC has failed to demonstrate a conflict between circuits that would justify this Court's review.

A. WSSC Cites No Applicable Support For Its "Single Release" Theory.

The district court cases cited by WSSC in support of its single release theory do not even stand for that proposition. All the decisions on which WSSC relies have concluded that the passive migration of a hazardous substance through the environment does not constitute "disposal" for purposes of imposing liability on a *former* owner/operator. *See United States v. Petersen Sand and Gravel, Inc., supra; Snediker Developers Ltd. Partnership v. Evans, supra; Ecodyne Corp. v. Shah, supra; Cadillac Fairview/California, Inc. v. Dow Chem. Co., supra.* [4] To

[4] Owner/operator liability takes two forms: current and historic. With respect to current owner/operators, § 9607(a)(1) provides,

> . . .t he owner and operator of a . . . facility. . . from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable [for response costs].

42 U.S.C. § 9607(a)(1).

With respect to past owner/operators, section 9607(a)(2) provides:

> . . . any person who *at the time of disposal of*

impose liability on a person who currently owns a facility where hazardous substances are released, it is enough to show that a hazardous substance has been released at or from that facility. In order to impose liability on a person who formerly owned a facility, it must additionally be shown that the person owned the facility at the time of "disposal" of a hazardous substance there.

The district courts in the cases on which WSSC relies uniformly concluded that "disposal" required active conduct, and, therefore, passive migration does not bring past owner/operators within the liability provision of § 9607(a)(2). The instant case, however, only involves the meaning and scope of "release" under CERCLA, not "disposal," thereby changing the focus of the analysis. The cases cited by WSSC did not reach the question whether a "release" includes passive migration. Indeed, in *Petersen Sand and Gravel*, 806 F. Supp. 1346, the district court, stated, ". . . it is undisputed that a 'release' includes the kind of passive migration at issue here." *Id.* at 1351. Thus, these cases are not applicable in the context of § 9607(a)(1) and do not pose an important question requiring review by this Court.[5]

> *any hazardous substance* owned or operated any facility at which such hazardous substances were disposed of, . . . from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable [for response costs].

42 U.S.C. § 9607(a)(2) (emphasis added).

[5] In addition to these cases, WSSC places heavy reliance on two entirely inapposite cases. In *Brookfield-North Riverside Water Comm'n v. Martin Oil*

Mktg. Ltd., No. 90 C 5884, 1992 WL 63274 (N.D. Ill. 1992), plaintiff sued Martin Oil to recover the cost of replacing a water supply line into which contaminants migrated after being released from Martin Oil's underground tanks. Martin Oil asserted a third party claim against Abbott, the company that constructed and installed the water main, on the theory that Abbott was an owner or operator of the water line while constructing it. The court dismissed the third-party claim on the grounds that the only release of the chemicals occurred when they escaped from Martin Oil's tanks into the surrounding soils and that, in any event, Abbott had never owned or operated the water line. Significantly, however, in *Martin Oil* there was no contention that the substances in question were ever subsequently released from the water pipe. Rather, the water pipe itself, not the environment outside that pipe, was the ultimate destination of the chemicals. Thus, *Martin Oil* did not really present facts that required the Court to decide whether there can be sequential "releases" of hazardous substance under CERCLA.

In *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988), *rescinded, vacated and dismissed, in part, on other grounds*, 1989 WL 225428 (D. Vt. 1989), the court actually assumed the possibility of sequential releases under CERCLA, stating:

> Migration of hazardous chemicals by drainage to publicly owned sewers from home plumbing systems, and the seepage and leaching from domestic septic systems that *continues from earlier discharges*, constitute "releases(s)" within the definition stated in section 9601(22).

684 F. Supp. at 832-33 (emphasis added).

B. If There Was Only One "Release," It Was From WSSC's Sewer.

WSSC asserts that the leaking of PCE from the Tech Road sewer line should not be considered a "release" under CERCLA because the PCE was already "released" by IFI's disposal of PCE-contaminated wastewater into the laboratory drains. This argument ignores the broad scope of the term "release" found in the statute. This provision defines "release" as "*any* spilling, leaking, . . . leaching . . . into the environment." 42 U.S.C. § 9601(22) (emphasis added). WSSC's position also fails to take into account the complete definition of "facility." This term is defined in CERCLA, insofar as is relevant here, as " . . (b) *any* site or area where a hazardous substance has been deposited, . . . or *otherwise come to be located*; . . ." 42 U.S.C. § 9601(9) (emphasis added).

WSSC's stance on this issue was reviewed, and rejected, by the court in *Lincoln Properties, Ltd. v. Higgins*, *supra*. *Lincoln Properties* involved a fact pattern similar to the instant case. In that case, a shopping center owner and former dry cleaner tenants at the site sought recovery under CERCLA from the county for cleanup costs of property contaminated by PCE. The court determined that the wells and sewer line owned by the county where there was contamination were "facilities" for purposes of CERCLA.

The court went on to decide the only issue presented on defendant Staco's motion for summary judgment, holding that Staco's release of mercury to its employees' clothing and persons, whence it subsequently entered sewer systems, was *also* a release. *Id.* at 833. *Accord Lincoln Properties, supra* ("[n]or is the 'one source' or 'passive owner exception' advocated by the County supported by the overall structure or purpose of CERCLA.") 823 F. Supp. at 1536.

Id. at 1535. It also rejected the county's claim that only one release occurred -- when the dry cleaners placed PCE into the sewer pipes. The court stated,

> [t]he statutory language does not suggest that the release of a substance occurs only once if the substance is migrating, or that liability is limited to the owner or operator that introduced the substance initially or was the source of the substance, or that a "passive" owner or operator is exempted from the Act.

Id.

Even if this argument had not been squarely rejected in *Lincoln Properties*, WSSC's argument would not be correct because it proves too much. Applying WSSC's single release theory, a "release into the environment" did not occur when IFI sent wastewater containing PCE down the laboratory drain. The term "environment" is defined in relevant part as ". . . any other surface water, ground water, . . . or subsurface strata . . ." 42 U.S.C. § 9601(8). Thus, if, as WSSC asserts, only one release is possible, the release did not occur until PCE leaked from the sewer pipes into the environment, *i.e.* the subsurface environment.

In support of its argument on this issue, WSSC urges this Court to view the sewer system as the "environment." Petition at 16. Ironically, WSSC's argument implies that its sewer was so leaky that putting wastewater into that system was tantamount to simply dumping it into a pit in the ground or down a well. However, viewing a sewer system as part of the environment ignores the fact that sewer lines are man-made structures intended to contain and convey wastewater. WSSC's Tech Road sewer may have been located in the subsurface strata of the environment, but clearly was never intended to be a part of that environment.

To the extent that WSSC insists on its one-release theory, this Court could only affirm the Court of Appeals. Thus, review is not warranted.

CONCLUSION

The petition for certiorari should be denied. The petition does not invoke any of the considerations generally considered by this Court in granting review of a decision of a court of appeals. WSSC does not present any novel or important issues which require discretionary review by this Court nor does the decision of the Court of Appeals conflict with a decision of another court of appeals.

Respectfully submitted,

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